

the 8 day of October, 2003
TESTE: LILLIE M. HART, CLERK 3:50pm
By [Signature] D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,

Chesapeake Case Nos.: CR03-3089

v.

CR03-3090

CR03-3091

Fairfax Case No:

K102888

Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

**DEFENDANT'S RESPONSE TO COMMONWEALTH'S
MOTION TO APPOINT PSYCHIATRIST PURSUANT
TO VIRGINIA CODE SECTION 19.2-264.3:1(F)**

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsel, and respectfully moves this honorable Court under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to deny the Commonwealth's motion to appoint Dr. Park Dietz as its expert under Virginia Code Section 19.2-264.3:1(F).

In support of this motion counsel states as follows:

1. On Tuesday, October 7, 2003 the Commonwealth filed its motion for the appointment of Dr. Park Dietz pursuant to § 19.2-264.3:1(F).

2. The defense objects to that appointment for the following reasons:

a. Dr. Dietz is the appointed expert in the same capacity in the trial of Commonwealth v. John Muhammad in Prince William County, venued in the City of Virginia Beach.

b. His appointment in this case would create a clear conflict of interest.

c. Appointment of the same expert in both cases would violate Lee Malvo's rights

to due process and to confront the witnesses against him since this Court has no statutory authority to make John Muhammad available to the defense expert for interview or evaluation.

d. Dr. Dietz and the Commonwealth would be required to release to counsel and experts for Lee Malvo the results of testing, evaluation, etc. of *John Muhammad* as used to support his evaluation and conclusions regarding Lee Malvo. Such disclosure is prohibited by Virginia Code Section 19.2-264.3:1 as applied to the *John Muhammad* case.

e. The reverse situation would be true as to Dr. Dietz's evaluation report on Lee Malvo being disclosed to the defense in Commonwealth v. John Muhammad.

f. The issue of fairness is raised where Dr. Dietz has previously testified that he charges at least \$500 per hour for his own time, \$85 - 90 per hour for the time of his investigators, and \$350 per hour for the time of his assistant. Five hundred dollars an hour is close to three times (2.857 times) the rate requested and authorized for the expert appointed by the Court to assist the defense under Virginia Code Section 19.2-264.3:1.

g. The Commonwealth appears to be seeking to inject error into this case prior to trial. Indeed, if Dr. Dietz were to have an opportunity to examine both defendants, an incurable error would occur at once.

h. Additionally, both the Houston Chronicle and ABC News have reported that Dr. Dietz has been the subject of a grand jury investigation into false testimony by him in the capital case of Texas v. Andrea Yates. They report Dr. Dietz acknowledges his testimony was factually erroneous.

i. Counsel for John Muhammad have advised that should Dr. Dietz be appointed to evaluate Lee Malvo, they will seek to have Dr. Dietz's testimony excluded from that trial.

WHEREFORE, for the forgoing reasons and for such others that may be raised at a

hearing on this matter, the defendant, Lee Malvo, by counsel, respectfully moves this honorable Court to deny the Commonwealth's motion to appoint Dr. Park Dietz pursuant to Virginia Code Section 19.2-264.3:1(F).

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

and _____

By _____
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CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was hand delivered to:

Robert F. Horan, Jr., Esquire
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and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 8th day of October, 2003.

Co-Counsel